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Supreme Court of the United States

OCTOBER TERM, 1954

No. 391

JOHN ALAN TOMLINSON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY
TO MEMORANDUM FOR THE UNITED STATES

MAY IT PLEASE THE COURT:

I.

The respondent suggests that the petition for writ of certiorari be deferred until after this Court has decided *Simmons* v. *United States*, No. 251, October Term 1954;

Sicurella v. *United States,* No. 250, October Term, 1954; *Witmer* v. *United States,* No. 164, October Term, 1954; and *Gonzales* v. *United States,* No. 69, October Term, 1954. None of these cases involves the precise problem presented here, on the question of whether there was basis in fact for the denial of the conscientious objector status.

The court below ruled that the mere exercise of the right of personal appearance under Section 1624.2 of the Selective Service Regulations and the continuance of the I-A-O classification by the local board following such personal appearance were a factual basis that the appeal board could consider in denying the I-O conscientious objector classification.

This strange rule of law, which places a registrant who exercises his right of personal appearance in a worse position than one who does not, ought to be considered and determined by this Court. Unless and until it is decided by this Court there will be scores of cases appealed to the court below from all the many states within its jurisdiction, where this rule of law will continue to be applied as a basis for the denial of a bona fide conscientious objector claim.

This problem is not presented in any of the other cases mentioned in the first paragraph of this point. The delay of the consideration of the petition for writ of certiorari will not prevent this Court from having to consider it. It will continue to be raised and presented unless and until the rule announced by the court below is reviewed, considered and decided by this Court.

There is no basis, therefore, for deferring this case until the other cases have been decided, because of the outstanding and unusual proposition of law announced by the court below on this point.

II.

Question 3 stated by respondent is not involved here. The question presented by petitioner is whether the local

board denied the petitioner a full and fair hearing upon his personal appearance concerning the ministerial claim. (See the petition, pages 4, 10-11, 19.) The petitioner does not contend before this Court that he was denied the ministerial status without basis in fact. The rule of *Dickinson* v. *United States,* 346 U. S. 389 (1953), is not invoked. His contention is that he has been denied procedural rights guaranteed by Section 1624.2(b) and (c) of the Selective Service Regulations upon personal appearance.

III.

It is contended by the respondent that petitioner was placing all emphasis upon his ministerial claim and that accordingly the conscientious objector claim is not substantially involved here. The court below, in *Clementino* v. *United States,* No. 13,918, Sept. 27, 1954, — F. 2d —, said that the registrant was denied due process of law when the hearing officer of the Department of Justice considered the appeal as involving only the ministerial classification. —Compare *Cox* v. *Wedemeyer,* 9th Cir., 1951, 192 F. 2d 920.

IV.

The respondent complains about petitioner's witness at the hearing before the hearing officer having served a sentence as a conscientious objector during World War II. —See paragraph 9 under "Statement" and footnote 5 in the Memorandum for the United States.

This Court can take judicial notice that Shield Halvajian was granted a full and unconditional pardon on October 18, 1954, by the President of the United States.

V.

Emphasis is placed by respondent on the letter written by petitioner to the Director of Selective Service on May 14, 1952. In this letter he stated that if he were to accept the noncombatant assignment in the armed forces he might as well compromise, "go all the way" and accept

combatant service in the armed forces. The quotation in paragraph 11 under "Statement" is only a part of what Tomlinson said. In his letter of May 14, 1952, he emphasized his conscientious objections to both combatant and noncombatant military service. Nowhere in that letter did Tomlinson say that he was willing to do either combatant or noncombatant military service. The quotation appearing in respondent's memorandum is taken out of its context and does not carry with it the meaning attributed to it by respondent, namely, that petitioner was willing to do combatant military service.

VI.

Respondent argues that the basis of Tomlinson's objections was that he did not want to leave his ministry. This was only one of the reasons assigned by Tomlinson. He stated that he was opposed to both combatant and noncombatant military service. His opposition was solidly grounded on religious training and beliefs. He claimed absolute Scriptural neutrality. Additionally, he stated that he desired to devote his time to the ministry. Both of these reasons were grounded on the Bible.

There is nothing in the act or regulations showing "this is not a ground for which Congress has provided exemption from military service," as stated by respondent under point 1. Congress did not specify any orthodox doctrine of pacifism in the act.

VII.

It is suggested by the respondent (point 2 of its memorandum) that the FBI report had nothing adverse in it. While the record does not reflect anything unfavorable, it requires speculation in order to reach the conclusion that there is nothing adverse. The trial judge inspected the FBI report *in camera*. He did not declare that there was nothing harmful in the FBI report.

This Court is not bound to accept the statement of the

Department of Justice that there was nothing unfavorable in the FBI report. It should be remembered that the full conscientious objector status or I-O classification was denied and Tomlinson was placed in Class I-A-O by the appeal board. This was recommended by the Department of Justice. The Assistant Attorney General had the FBI report before him. So did the hearing offcer. There is nothing to indicate that they did not use the FBI report in making the recommendation to the appeal board.

What was said in *United States* v. *Packer*, 2d Cir., 1952, 200 F. 2d 540 (reversed on other grounds, 346 U. S. 1 (1953)) applies here. There the court said: "It is true that in the case at bar the defendant was told that the F.B.I. report was altogether favorable to him. But the correctness of such a representation was, in our opinion, a matter which the defendant was entitled to judge for himself by seeing the original F.B.I. record."

It is for the court to say whether there was anything unfavorable. The trial court saw the report *in camera,* but counsel for petitioner did not get to see it at the trial.

VIII.

It is suggested (point 3 of respondent's memorandum) that the denial of the full and fair hearing by the local board, when it refused to consider the ministerial claim because Tomlinson had not attended a theological seminary, is harmless error. The reason the respondent contends that the illegality was cured was that the appeal board reclassified Tomlinson and that this superseded the action of the local board.

In *Franks* v. *United States,* No. 14,114, decided by the court below on October 4, 1954, — F. 2d —, it is said:

> "The next question is whether in view of the fact that Franks took an appeal and was finally classified by the appeal board, any failure to com-

> ply with this regulation [§ 1623.2] by the local board was cured under the doctrine of *Cramer* v. *France,* 9 cir., 148 F. 2d 801; *Tyrrell* v. *United States,* 9 cir., 200 F. 2d 8, and *Reed* v. *United States,* 9 cir., 205 F. 2d 216. We think that such was not the case. In *White* v. *United States,* — F. 2d —, (decided Sept. 14, 1954), we pointed out the fact that in consideration of a claim of conscientious objection and of the question of whether a registrant should be so classified, the personal appearance of the registrant before the local board is of major and commanding importance. The appeal board, notwithstanding it has the aid of a written report from a hearing officer, has no similar opportunity to judge of the genuineness, the sincerity and the extent of a registrant's conscientious objection to military service. Therefore a registrant who fails to have a fair chance for his proper classification on his appearance before the local board has been denied something which cannot be cured through the action of the appeal board. Such was our holding in *Knox* v. *United States,* 9 cir., 200 F. 2d 398. ([Footnote 5:] Other cases in which the failure of the local board to comply with regulations was not cured by the action of an appeal board are *United States* v. *Fry,* 2d cir., 203 F. 2d 638, and *United States* v. *Stiles,* 3 cir., 169 F. 2d 455.)"

It is apparent that the cases relied upon by the respondent in point 3 of its memorandum do not apply. There the question involved was whether the local board wrongly classified the registrant. When the only point involved is an illegal classification by the local board it is harmless error, because of the reclassification by the appeal board. But when there has been a denial of procedural due process of law by the local board this rule does not apply. Reclassi-

fication by the appeal board does not cure procedural illegalities committed by the local board.

IX.

Point 4 of the respondent's memorandum is entirely irrelevant and immaterial. It has been pointed out heretofore that Tomlinson makes no complaint about the classification denying him his ministerial exemption. The illegality of the classification is based on the denial of the full conscientious objector status and not the ministerial claim. The denial of the ministerial claim is not one of the questions presented to this Court on the petition for writ of certiorari. It is conceded that Tomlinson was not pursuing his ministry as his vocation. He cannot urge illegality of the appeal board classification for this reason. It was not presented in the petition for writ of certiorari. Therefore it was unnecessary for the respondent to discuss this point in its memorandum.

CONCLUSION

The decision by the court below is incorrect on the facts and on the law. The questions presented are important. There are questions involved that will not be determined by the other cases pending before this Court. It is suggested that it would be prejudicial to the petitioner to defer action on this petition until the pending cases are decided by this Court. After the other cases are decided there will remain for determination vital questions affecting the administration of the law in all the states under the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

It should be remembered that the court below has declared that a registrant who has a personal appearance before the local board, pursuant to Section 1624.2 of the regulations, and who has been denied his conscientious objector classification by that board may find such personal

appearance and classification by the local board taken as basis in fact for the denial of his conscientious objector status by the appeal board. This rule of law remains the law of the Ninth Circuit regardless of the decision that is made in the other pending cases.

The only way that the correctness of that particular holding can be determined is to grant the petition for writ of certiorari in this case. To save the time of this Court (and not settle the issues under the administration of the Universal Military Training and Service Act piecemeal) it would be good to grant the writ in this case and set this case down for argument with the other cases, so that all facets of the problem can be considered and the law settled at one time. To defer consideration of the problem would merely aggravate the situation by increasing the number of future additional cases that will have to be brought to this Court in order to settle this particular problem.

There is also the ruling of the court below that approved the procedure of the trial judge in inspecting the FBI report *in camera.* The FBI report, which was before the Department of Justice and not seen by the registrant, has been an exhibit in these proceedings all along, and petitioner has been denied opportunity to inspect or use the FBI report in the proceedings. The correctness of the *in camera* inspection and the denial of the use of the FBI report to petitioner will not be settled by a decision in the other cases.

The petition for writ of certiorari should be granted in this case and the case should be ordered set down for argument along with the other cases, namely, *Gonzales* v. *United States,* No. 69, October Term, 1954; *Witmer* v. *United States,* No. 164, October Term, 1954; *Sicurella* v.

United States, No. 250, October Term, 1954; *Simmons* v. *United States*, No. 251, October Term, 1954; and *White* v. *United States*, No. 390, October Term, 1954.

Respectfully submitted,

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November, 1954.